RECENT CASES

CONSTITUTIONAL LAW—STATE POWER TO REALIGN POLITICAL SUBDIVISIONS HELD LIMITED BY FIFTEENTH AMENDMENT

Petitioners, Negroes and former residents of the city of Tuskegee, Alabama, sought a declaratory judgment and injunctive relief in federal district court, claiming that an Alabama statute [1] redefining the boundaries of the city of Tuskegee violated the fourteenth and fifteenth amendments of the Constitution. The complaint alleged that the statute changed the shape of the city from a square into an irregular twenty-eight-sided figure,[2] and that the effect of this transformation was to remove from the city all but four or five of its 400 Negro voters while not removing a single white elector.[3] The district court dismissed the action for lack of jurisdiction and failure to state a claim upon which relief could be granted.[4] The Court of Appeals for the Fifth Circuit affirmed the dismissal.[5] The Supreme Court reversed, holding that the power of the state to alter or destroy its political subdivisions is limited by the fifteenth amendment [6] and that the authority of the federal courts to consider the question of infringement of petitioners' right to vote was not foreclosed by the "political question" doctrine of *Colegrove v. Green.*[7] *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

A state's power to alter or destroy its political subdivisions has heretofore been commonly thought to be unrestricted by the Constitution.[8] The cornerstone of this dogma was laid by the Supreme Court in *Hunter v. City of Pittsburgh*,[9] which involved a claim by the residents of Allegheny, Pennsylvania, that the state legislature's proposed consolidation of the cities of Allegheny and Pittsburgh impaired an implied contract between the city

[1] Ala. Acts 1957, No. 140.

[2] The old and new boundaries are mapped in an Appendix to the Opinion of the Court, Gomillion v. Lightfoot, 364 U.S. 339, 348 (1960).

[3] Before the alteration of the boundaries Tuskegee contained approximately 5,397 Negroes and 1,310 white persons. Of its qualified voters about 400 were Negro and 600, white. Brief for the United States as Amicus Curiae, p. 2, Gomillion v. Lightfoot, *supra* note 2.

[4] Gomillion v. Lightfoot, 167 F. Supp. 405 (M.D. Ala. 1958). The court did not distinguish between these two grounds. Compare Bell v. Hood, 327 U.S. 678 (1946).

[5] Gomillion v. Lightfoot, 270 F.2d 594 (5th Cir. 1959) (2-to-1 decision).

[6] Petitioners also claimed relief under the fourteenth amendment. See Gomillion v. Lightfoot, 364 U.S. 339, 340 (1960). The majority of the Court, per Mr. Justice Frankfurter, pointedly omitted to consider that claim. But Mr. Justice Whittaker, concurring, thought the decision could only rest on the equal protection clause of the fourteenth amendment. 364 U.S. at 349 (concurring opinion).

[7] 328 U.S. 549 (1946). See notes 13-16 *infra* and accompanying text.

[8] See COOLEY, MUNICIPAL CORPORATIONS §§ 22, at 70, 31-34 (1914); RHYNE, MUNICIPAL LAW § 2-26, at 27 (1957); 1 YOKLEY, MUNICIPAL CORPORATIONS §§ 6, 11, 16, 22 (1956).

[9] 207 U.S. 161 (1907).

and its citizens that municipal taxes would be spent for the benefit of Allegheny alone. It was also contended that to subject Allegheny residents to the increased tax burdens likely to result from the consolidation would deprive them of their property without due process of law. The Court rejected both contentions and declared, by way of dictum, that as between a state and its municipal corporations "the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States." [10] The effect of this sweeping statement is fortified by a series of cases holding that the relationship between a state and its governmental subdivisions does not constitute a contractual obligation protected by the Constitution.[11] Thus, while it has required that when states realign their subdivisions they preserve to the creditors of units thereby destroyed some means for collecting the debts owed them,[12] the Court has never enjoined a realignment on the ground that it violated the constitutional rights of any or all of the residents of the affected subdivisions.

This practice is complemented, where the subdivision also represents a voting unit, by the "political question" doctrine enunciated in *Colegrove v. Green*.[13] Under this doctrine the Court has refused to consider suits seeking to upset the boundaries of malapportioned voting districts [14] on the ground that such suits involve questions "peculiarly political [in] nature and therefore not meet for judicial determination." [15] The exercise of this self-restraint has permitted state legislatures to retain political subdivisions whose residents have had their voting strength diluted by population shifts or to achieve, by means of affirmative action, malapportionment of voting districts in order to weaken the political influence of particular segments of the population.[16] Thus a state's action concerning its voting subdivisions, lying as it does at the confluence of these two doctrines, has

[10] *Id.* at 179.

[11] See City of Trenton v. New Jersey, 262 U.S. 182 (1923); City of Pawhuska v. Pawhuska Oil & Gas Co., 250 U.S. 394 (1919). *Cf.* Comm'rs of Laramie County v. Comm'rs of Albany County, 92 U.S. 307 (1875).

[12] See Shapleigh v. San Angelo, 167 U.S. 646 (1897); Mobile v. United States *ex rel.* Watson, 116 U.S. 289 (1886); Mount Pleasant v. Beckwith, 100 U.S. 514 (1879); Broughton v. Pensacola, 93 U.S. 266 (1876).

[13] 328 U.S. 549 (1946). While *Hunter* involved a municipal corporation and *Colegrove* congressional districts, the opinion in the instant case does not imply that the identity of the subdivision involved is crucial; the Court discusses a state's power over its political subdivisions—"to wit, cities, counties, and other local units"—generally. Instant case at 342. While *Colegrove* has apparently never been applied to municipalities, it has been applied to counties used as voting units. See South v. Peters, 339 U.S. 276 (1950).

[14] The Court has followed an uneven pattern in disposing of these appeals. See, *e.g.*, Radford v. Gary, 352 U.S. 991 (1957), *affirming per curiam* 154 F. Supp. 541 (W.D. Okla. 1956), citing Kidd v. McCanless, 352 U.S. 920 (1956), *dismissing appeal from* 200 Tenn. 273, 292 S.W.2d 40 (1956); Colegrove v. Barrett, 330 U.S. 804 (1947), *dismissing for want of substantial federal question appeal from* judgment of March 10, 1947 of the District Court for the Northern District of Illinois (unreported).

[15] Colegrove v. Green, 328 U.S. at 552.

[16] See Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1059-66 (1958).

been thought to be insulated from judicial application of the restraints of the fourteenth and fifteenth amendments.

In reaching its decision in the instant case, the Court virtually obliterated the *Hunter* dogma by limiting that case to its facts, labeling the sweeping language of the opinion "dictum," and expressly repudiating broad interpretations based on that language.[17] In the Court's view, *Hunter* and kindred cases [18] only held that "the State's authority is unrestrained by the particular prohibitions of the Constitution considered in those cases": the contract clause and the due process clause of the fourteenth amendment.[19] In addition, the Court rejected defendant's contention that relief was, in any event, barred by the *Colegrove* case. The Court specifically distinguished *Colegrove* on the ground that that case involved dilution of the strength of votes as "a result of legislative inaction over a course of many years," whereas the instant case brought into question "affirmative legislative action" which deprived petitioners of their votes.[20] But in devoting its attention almost exclusively to a demonstration of the inapplicability of *Hunter* and *Colegrove*, the Court left its conclusion that under the facts alleged the challenged statute "denied or abridged" the petitioners' right to vote, as guaranteed by the fifteenth amendment, with little analysis or discussion.[21] A closer examination of this issue, particularly with reference to prior decisions of the Supreme Court, suggests that the decision in the instant case has subtly added a new dimension to the meaning of the right to vote. The effect of previous cases under the fifteenth amendment has been to strike down state action which prevented Negroes from voting either in any election for any officials at any level of government,[22] in the primary of the party of their choice,[23] or in the only election in which they could effectively express a preference.[24] The instant case

---

[17] See instant case at 342-44.

[18] See cases cited note 11 *supra*.

[19] Instant case at 344.

[20] Instant case at 346.

[21] Before launching its discussion of *Hunter* and *Colegrove*, the Court made the following statement:

> If these allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote.
>
> It is difficult to appreciate what stands in the way of adjudging a statute having this inevitable effect invalid in light of the principles by which this Court must judge, and uniformly has judged, statutes, that howsoever speciously defined, obviously discriminate against colored citizens.

Instant case at 341-42. This passage constituted the Court's discussion of the effect of the statute.

[22] See Lane v. Wilson, 307 U.S. 268 (1939); Guinn v. United States, 238 U.S. 347 (1915); Myers v. Anderson, 238 U.S. 368 (1915) (dictum).

[23] See Smith v. Allwright, 321 U.S. 649 (1944). *Cf.* United States v. Classic, 313 U.S. 299 (1941). Earlier cases involving discrimination against Negroes in primaries were decided under the equal protection clause. See Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927).

[24] See Terry v. Adams, 345 U.S. 461 (1953).

apparently involved no such sweeping exclusion of Negroes from the polls, but merely a denial of the right to vote in a particular political subdivision. While the Court may have considered *sub silentio* petitioners' claim that registration to vote in their new place of residence would be extremely difficult,[25] the opinion itself ignored this issue and thus seems to have expanded the fifteenth amendment's protection to include the right to vote in a particular political unit without abridgement[26] by unreasonable and arbitrary manipulation of boundaries[27] for the purpose of disenfranchising, at least in that unit, members of a particular racial group.

Although the Court did not consider petitioners' claim that the realignment violated the equal protection clause,[28] it would appear that the instant case might nevertheless have an impact on the judicial application of that provision. Here, however, conflict with *Colegrove v. Green* is even more immediate, since it is in cases arising under this clause that the doctrine of that case has had its greatest application and importance.[29] But if the right to vote, whether protected by the specific terms of the fifteenth amendment or the broader wording of the equal protection clause, means what the present case appears to say it does—that is, the right to vote in a particular subdivision unless the legislature, in adjusting its boundaries, can show some legitimate purpose for the realignment[30]—then the Court would appear to have taken a major step toward permitting judicial review of realignment schemes[31] which are aimed at discriminating

---

[25] See Brief for Petitioners, p. 5. Perhaps another unarticulated consideration was the effect of the gerrymandering on the school segregation problem.

[26] For a discussion of what the drafters of the fifteenth amendment probably intended by the word "abridged," see Mathews, *Legislative and Judicial History of the Fifteenth Amendment* 38-39, in 27 JOHNS HOPKINS UNIV. STUDIES IN HISTORICAL AND POLITICAL SCIENCE (1909).

[27] Justice Frankfurter's opinion for the Court seems to allow that if the state could show some legitimate purpose for its action, the legislation would be valid: "Against this claim the respondents have never suggested, either in their brief or in oral argument, any countervailing municipal function which Act 140 is designed to serve." Instant case at 342. This tolerance would accord with the test of reasonableness usually applied under the equal protection clause. See, *e.g.*, Morey v. Doud, 354 U.S. 457 (1957); Hartford Steam Boiler Inspection & Ins. Co. v. Harrison, 301 U.S. 459 (1937); Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32 (1928). Compare Professor Freund's contention that the Supreme Court should apply a test analogous to that applied in commerce clause cases, see, *e.g.*, Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951), to civil rights cases, asking whether the government could reach its objective by other, less damaging means. Freund, *Comment*, in GOVERNMENT UNDER LAW 357-58 (Sutherland ed. 1956).

[28] Compare instant case at 349 (concurring opinion of Whittaker, J.); note 6 *supra*.

[29] Although the Court has never applied the doctrine in a fifteenth amendment case, the Court's discussion of *Colegrove* in the instant case would seem to raise the inference that its application in such cases is not without the realm of possibility. Instant case at 346-47. *But see* Frankfurter, *John Marshall and the Judicial Function*, in GOVERNMENT UNDER LAW 19 (Sutherland ed. 1956), where Justice Frankfurter does not mention the fifteenth amendment as one under which the courts must decide whether to abstain from adjudication because of the "political" nature of the question involved.

[30] See note 27 *supra*.

[31] Although the Court's opinion in *Colegrove* emphasized Congress' responsibility for securing fair representation, see 328 U.S. at 554-56, the subsequent application

against particular ethnic, political, religious, or geographical sectors of the electorate.[32]

Even if the present case has these broader ramifications which its narrow ground—violation of the fifteenth amendment—would not immediately suggest, the Court was not necessarily mistaken in distinguishing *Colegrove v. Green.* The criterion on which the Court relies—the presence of "affirmative legislative action" in the instant case[33]—while not completely satisfactory,[34] nevertheless serves to distinguish this case from most of those in which *Colegrove* has been applied, cases where the complaints were directed against persistent legislative inaction which, together with large population shifts, had served to dilute the electoral strength of certain segments of the population.[35] However, the use of judicial power in the instant case to strike down a redistricting statute suggests the feasibility, at least from the point of view of judicial administration, of invoking that power in cases in which state legislatures, by affirmative action, have effected redistricting schemes which result in discernible patterns of discrimination based solely on grounds of political affiliation, for example, and which seemingly have no other rational purpose or motive.

The obstacle to reaching any firm assessment of the impact of the instant case, however, is the uncertainty veiling the present relationship between rights protected by the fifteenth amendment and those guaranteed by the equal protection clause. Some recent decisions involving Negroes' rights have led one critic to accuse the Court of abandoning constitutional principle in order to strike down all invidious schemes for

---

of the doctrine in South v. Peters, 339 U.S. 276 (1950), where an injunction against the use of Georgia's county unit system in both federal and state elections was sought, would appear to indicate some broader reason for the doctrine than mere separation of powers within the federal government. See note 13 *supra.* Likewise, the Court in the instant case, while pointing out the fact that *Colegrove* involved congressional elections, did not attempt to distinguish the case on that ground. See discussion of *Colegrove,* instant case at 346-47.

[32] Undoubtedly the most prevalent discrimination today is that worked against urban voters by rural-dominated legislatures. See Lewis, *supra* note 16, at 1059-66. This was the basis of the complaint in both the *Colegrove* and *South* cases. However, since this discrimination usually grows out of legislative inaction and major population shifts, and generally concerns state and federal rather than local elections, the problems presented differ from those involved in the instant case. See note 34 *infra.*

[33] Instant case at 346.

[34] Probably a more realistic distinction is the ready availability of an effective remedy in the instant case. Whereas the Court in *Colgrove,* had it taken jurisdiction and decided for the plaintiffs, would have been obliged either to devise a direct order requiring legislative reapportionment, to enjoin the application of the existing apportionment scheme, thereby indirectly forcing reapportionment or an election-at-large, or to apportion the congressional districts itself—each of which presents its own peculiar difficulties—the Court here, by invalidating the allegedly discriminatory statute, presumably achieved a reversion of the boundaries to their former position. Compare South v. Peters, 339 U.S. 276, 280 (1950) (dissenting opinion of Douglas, J.). For a discussion of the Court's reluctance to work in this area and the problems of formulating effective remedies, see Lewis, *supra* note 16, at 1066-70, 1087-90; Note, 15 RUTGERS L. REV. 82 (1960); Note, 62 HARV. L. REV. 659, 665-69 (1949).

[35] *Colegrove* itself involved Illinois congressional districts which were drawn in 1901. 328 U.S. at 550. See also Shiver v. Gray, 276 F.2d 568 (5th Cir. 1960) (15-year lapse since last redistricting); Baker v. Carr, 179 F. Supp. 824 (M.D. Tenn. 1959), *prob. juris. noted,* 364 U.S. 898 (1960), *reargument scheduled,* 366 U.S. 907 (1961) (last redistricting in 1901).

discriminating against the colored race.[36] In rebuttal, another commentator has argued that the fifteenth amendment demands of the states "a heavier affirmative duty to assure an equal franchise than does the fourteenth," [37] and therefore the principles by which these cases are judged are necessarily different and more stringent. Only future litigation will tell whether the emphasis which the Court placed upon the racial aspect of the instant case [38] implies that state power to realign political subdivisions is virtually unlimited so long as any discrimination which results runs along other than racial lines. In any event, the instant case shows that federal courts can and will invoke their equity powers in some cases involving legislative realignment of political subdivisions. The case makes it more imperative than ever that the Court—at least in those cases involving rights apparently identical with those recognized here [39]—abandon the perfunctory format of the per curiam opinions which have marked the application of the *Colegrove* doctrine.[40]

---

[36] Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 28-29 (1959). Professor Wechsler argues that the prohibitions of the fifteenth amendment and of the equal protection clause are, or at least should be, identical, and that Smith v. Allwright, 321 U.S. 649 (1944), and Terry v. Adams, 345 U.S. 461 (1953), do not pass muster by this standard. He ponders whether the Court would have reached the same decisions in these cases had they involved a religious party which excluded members of other faiths from its primary elections. *Id.* at 29.

[37] See Pollak, *Racial Discrimination and Judicial Integrity: a Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 23 (1959). Professor Pollak bases his argument on the premise that unless the fifteenth amendment does so, it "would be a redundancy, having no scope for separate and effective application." *Ibid.* This view, however, seems to slight the historical background of the suffrage amendment. It must be remembered that at the time of its adoption, the right to vote was not thought of as one of the privileges and immunities of national citizenship, which were what the privileges and immunities clause of the fourteenth amendment was intended to safeguard. See Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874) (denial of women's suffrage does not violate the fourteenth amendment). And even recognition of this right as a concomitant of national citizenship would not have achieved the purpose of those who drafted the fifteenth amendment, for they, as Professor Pollak points out, sought to protect the right to vote against abridgement in any election—federal, state, or local—on account of race, color, or previous condition of servitude. Pollak, *supra* at 23. See generally Mathews, *supra* note 26, at 37-38. And if the privileges and immunities which accrued from national citizenship did not include the right to vote in federal elections, clearly they did not include the right to vote in state and local elections, inasmuch as the first sentence of that amendment expressly recognizes the distinction between national and state citizenship. That this desire to remedy what was then deemed to be a deficiency in the existing constitutional guarantees represents the origins of the fifteenth amendment was suggested by the Supreme Court in Minor v. Happersett, *supra* at 175 (dictum). And as for the equal protection clause, it is perhaps sufficient to note that the *Minor* case did not even consider this clause as a possible guarantor of women's suffrage and that the history of the amendment which Professor Mathews details makes no mention that the problem of redundancy was raised. If these factors sufficiently explain the historical *raison d'être* of the amendment—toward which the claim of redundancy would appear inevitably directed—subsequent interpretations of the equal protection clause which have now rendered the fifteenth amendment perhaps largely unnecessary would not demand a searching, as Professor Pollak seems to indicate, for some distinction in the principles applied to the two amendments. If there is no such need, Professor Pollak might well accept the relevance of the instant case to the equal protection clause, inasmuch as he also recognizes the function of that clause as a guarantor of the franchise. Pollak, *supra* at 23.

[38] See note 21 *supra*.

[39] See note 32 *supra* and accompanying text.

[40] See note 14 *supra*.

CORPORATIONS—Stockholders' Refusal To Sue Is No Bar to Derivative Suit for Continuing Violation of Federal Antitrust Laws

Plaintiff submitted a resolution to a shareholders' meeting[1] of Metal & Thermit Corporation (M & T) calling upon the directors to sue American Can Company (Canco), a major shareholder in M & T[2] and its principal supplier of raw materials, for violations of the antitrust laws.[3] An independent majority of the shareholders defeated the resolution.[4] Plaintiff then instituted a derivative suit in a federal district court against Canco and the directors of M & T, praying for treble damages for past violations of the antitrust laws and an injunction against future violations.[5] Defendants moved to dismiss on the ground that the prior shareholders' vote was a binding exercise of the corporation's business judgment not to sue. But the court held that in view of plaintiff's allegation of a continuing antitrust violation, the shareholders' vote must be taken as an invalid attempt to ratify the directors' illegal actions and hence as no bar to plaintiff's derivative suit. The motion to dismiss was overruled. *Rogers v. American Can Co.*, 187 F. Supp. 532 (D.N.J. 1960), *appeal docketed*, No. 13493, 3d Cir., Jan. 12, 1961.

A derivative suit is brought by a shareholder on behalf of his corporation to enforce a cause of action which the management refuses to pursue.[6] The dangers inherent in permitting shareholders to bring corporate suits without the knowledge or against the will of the management or majority shareholders[7] have caused the courts to impose certain prerequisites upon would-be plaintiffs in such actions. For example, the plaintiff must allege his own status as a shareholder when the cause of action arose,[8] refusal by the directors to act after proper demand,[9] and, in most cases, failure of the shareholders to respond to a similar demand.[10] The courts, however, have

---

[1] Exhaustion of intracorporate remedies is a prerequisite to bringing a derivative suit in a federal district court. Fed. R. Civ. P. 23(b).

[2] Canco owned about 23% of the voting shares of M & T and was able to elect eight of the twelve directors.

[3] The gravamen of plaintiff's complaint was that Canco had fixed its prices to M & T arbitrarily and, by its illegal control over M & T, had disabled M & T from purchasing raw materials in the competitive market.

[4] Without the votes of Canco's shares, the resolution was defeated by more than two to one.

[5] Plaintiff charged violations of §§ 1 and 2 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (1958), and §§ 7 and 8 of the Clayton Act, 38 Stat. 731, 732 (1914), as amended, 15 U.S.C. §§ 18, 19 (1958). See note 3 *supra*.

[6] Booth v. Robinson, 55 Md. 419, 438-39 (1881); Bartlett v. New York, N.H. & H.R.R., 221 Mass. 530, 109 N.E. 452 (1915); 13 Fletcher, Private Corporations § 5945 (rev. vol. 1961); Stevens, Corporations § 168 (2d ed. 1949).

[7] See Stevens, *op. cit. supra* note 6, §§ 171-73, discussing in part the problem of the "strike suit."

[8] *Id.* § 171.

[9] Akin v. Mackie, 203 Tenn. 113, 310 S.W.2d 164 (1958) (stating the general rule); 13 Fletcher, *op. cit. supra* note 6, § 5963.

[10] American Life Ins. Co. v. Powell, 262 Ala. 560, 80 So. 2d 487 (1955); Loxair Corp. v. Biscoe, 192 Ga. 357, 15 S.E.2d 438 (1941); Stevens, *op. cit. supra* note 6,

differed as to the effect of an adverse stockholders' vote. One generally accepted maxim is that shareholders may not ratify illegal actions by the directors.[11] However, in recent years [12] a new principle has been developed that stockholders may make an independent and reasonable judgment that it would not be in the best interest of their corporation to pursue a given cause of action.[13] The leading case espousing that view is *S. Solomont & Sons Trust, Inc. v. New England Theatres Operating Corp.*,[14] in which the Massachusetts court approved the procedure of the trial court, which had taken evidence as to the considerations that motivated the stockholders when they voted not to sue, and had determined on the basis of that evidence that the vote was reasonable. While the *Solomont* approach prevents an unwilling majority from being forced to assert claims which may be worthless or harmful in the long run to the corporation,[15] it may also tend to weaken the derivative suit as an institution for protecting minority shareholders' rights because shareholders in large corporations must undertake expensive proxy battles to make most certain the chances of bringing the suit.[16] Furthermore, if the approach is to be justified, the rather dubious proposition that shareholders always have adequate information and experience to judge whether or not a cause of action should be pressed must be assumed.[17]

While indicating disapproval of the *Solomont* holding, the court in the instant case distinguished that case on the fact that the Massachusetts court decided no more than the effect of a stockholders' vote upon a suit to redress injuries inflicted in the past.[18] The instant case involved allegations of a course of conduct continuing into the future, from which, together with the

---

§ 169. This requirement has been relaxed where demand would be futile either because management would control the shareholder vote, Gottesman v. General Motors Corp., 171 F. Supp. 661 (S.D.N.Y.), *petition for interlocutory appeal denied*, 268 F.2d 194 (2nd Cir. 1959); Von Arnim v. American Tube Works, 188 Mass. 515, 74 N.E. 680 (1905); Akin v. Mackie, *supra* note 9, or because the stockholders do not have the legal power to prevent suit, Continental Sec. Co. v. Belmont, 206 N.Y. 7, 99 N.E. 138 (1912).

[11] See, *e.g.*, Mayer v. Adams, 141 A.2d 458 (Del. 1958); Continental Sec. Co. v. Belmont, 206 N.Y. 7, 99 N.E. 138 (1912).

[12] This is not to say that Continental Sec. Co. v. Belmont, *supra* note 11, was the only law before 1950. Kessler & Co. v. Ensley Co., 129 Fed. 397 (C.C.N.D. Ala. 1904), *cert. denied*, 205 U.S. 541 (1907), decided that a stockholders' vote not to sue barred suit, and Siegman v. Electric Vehicle Co., 72 N.J. Eq. 403, 65 Atl. 910 (Ct. Err. & App. 1906) decided the opposite. *Cf.* Groel v. United Electric Co., 70 N.J. Eq. 616, 61 Atl. 1061 (Ch. 1905).

[13] See Pomerantz v. Clark, 101 F. Supp. 341 (D. Mass. 1951); S. Solomont & Sons Trust, Inc. v. New England Theatres Operating Corp., 326 Mass. 99, 93 N.E.2d 241 (1950); Claman v. Robertson, 154 Ohio St. 61, 128 N.E.2d 429 (1955).

[14] 326 Mass. 99, 93 N.E.2d 241 (1950).

[15] See Kessler & Co. v. Ensley Co., 129 Fed. 397 (C.C.N.D. Ala. 1904), *cert. denied*, 205 U.S. 541 (1907). See also Note, 73 HARV. L. REV. 746, 749-52, 760-61 (1960).

[16] See Pomerantz v. Clark, 101 F. Supp. 341, 344-46 (D. Mass. 1951).

[17] See Leavell, *The Shareholders as Judges of Alleged Wrongs by Directors*, 35 TUL. L. REV. 331, 353 (1961); Stickells, *Derivative Suits—The Requirement of Demand Upon the Stockholders*, 33 B.U.L. REV. 435, 440 (1953).

[18] Instant case at 539.

fact that the M & T shareholders at the same meeting had reelected the eight directors who had cooperated with Canco by permitting the violation, the court concluded that the shareholders had, in effect, attempted to ratify an illegal act.[19]

If binding, the stockholders' vote would have left M & T open to further victimization, for the vote could not have rendered legal the previously illegal collusion between Canco and the M & T directors, and it would have amounted to the kind of uncoerced acquiescence in infractions of the antitrust laws that is regarded as such participation in the violation that the cooperative victim is deemed as much in breach of the law as the active violator.[20] In this sense the stockholders' vote was correctly characterized by the court as "a ratification of violations of Federal law . . . ." [21]

Even if the *Solomont* approach had been followed in the instant case, the result might well have been the same, for *Solomont* requires that the shareholder vote not to sue be a reasonable business judgment, and the M & T vote was seemingly unreasonable on its face. The usual good reasons not to sue—fear of undue expense [22] and bad publicity—are clearly very different from a desire to have some advantage from violating the law.

It is arguable that plaintiff-stockholder could have brought a direct action against the directors of M & T to restrain them from further illegal conduct.[23] Thus, even if precluded from bringing a derivative suit by the vote which preceded the instant case, he might have instituted a suit for injunction which would have brought into issue the very questions as to the illegality of the directors' transactions which were raised in this case. To establish that the directors were harming plaintiff's interest in the corporation by their activities would require proof similar to that which will be called for when the present case is tried on the merits, and much of the same adverse publicity and corporate expense in defending the suit would be incurred in either action. The result of the instant case permits the plaintiff to get directly to the substance of his allegations without further technical obstructions. The policy of the antitrust laws to prevent the kind of conduct which was alleged in the instant case suggests that a share-

---

[19] Instant case at 539-40. The application of the term "ratify" to stockholders' votes before derivative suits is a mere label for a legal conclusion. In one sense there is a ratification every time a shareholders' vote bars a suit from being brought; in that sense the vote in *Solomont* "ratified" illegal conduct, for the court permitted the vote to prevent the violations from being subject to legal action.

[20] United States v. Paramount Pictures, 334 U.S. 131, 161 (1948). *Cf.* Eastman Kodak Co. v. Blackmore, 277 Fed. 694 (2d Cir. 1921) (alternative holding).

[21] Instant case at 540.

[22] Antitrust suits are typically "big" suits. See FIELD & KAPLAN, MATERIALS ON CIVIL PROCEDURE 485 (1953).

[23] See De Koven v. Lake Shore & M.S. Ry., 216 Fed. 955 (S.D.N.Y. 1914); *cf.* Schechtman v. Wolfson, 244 F.2d 537, 539 (2d Cir. 1957) (dictum), 66 YALE L.J. 413; Hill v. Erwin Mills Inc., 239 N.C. 437, 80 S.E.2d 358 (1954). *But see* Continental Sec. Co. v. Michigan Cent. R.R., 16 F.2d 378 (6th Cir. 1929), *cert. denied*, 274 U.S. 741 (1928).

holder should have a right to invoke the treble damage sanction,[24] even though the other stockholders may have determined that the corporation would benefit by the violation. The antitrust laws are intended to protect the public from just this sort of "reasonable" action.

EVIDENCE—Testimony as to Prior Identification of Defendant Held Admissible as Substantive Evidence but Insufficient Alone To Sustain Conviction

The victim of a burglary walked into her apartment as the crime was being committed and briefly saw the burglars before they fled. At trial, six months later,[1] she was unable positively to identify the defendants as the men she had seen.[2] But the judge admitted a policeman's testimony that an hour after the crime he had shown her seven to ten small photographs from which she had chosen two as being of the men she had seen, and that the photographs thus selected depicted the defendants. Defendants were convicted. On appeal, the Supreme Court of California held that the admission of the policeman's testimony was not error and that an incriminating admission made by one of the defendants at the time of his arrest was sufficient evidence of identity to sustain that defendant's conviction. Regarding the other defendant, however, the court held that the testimony as to the prior identification, standing alone, was insufficient to establish his identity as one of the burglars, and his conviction was reversed and remanded for a new trial. *People v. Gould*, 54 Cal. 2d 621, 354 P.2d 865, 7 Cal. Rptr. 273 (1960).

Even when they have been preceded by extrajudicial identifications in which the danger of suggestion was strong,[3] courtroom identifications are admissible and have generally been held sufficient to identify the defendant as the perpetrator of the crime at issue.[4] But, because of its hearsay character, testimony as to a prior identification is generally not admitted

[24] Compare 2 B.C. Ind. & Com. L. Rev. 412, 414 (1961).

[1] See Opening Brief of Appellant Marudas, p. 1, People v. Gould, 1 Cal. Rptr. 726 (Dist. Ct. App. 1959).

[2] She testified that one of the defendants had "some features but not all of the features" of one of the men she had seen but that she did not see anyone in the courtroom who looked like the other man. People v. Gould, 54 Cal. 2d 621, 625, 354 P.2d 865, 866, 7 Cal. Rptr. 273, 274 (1960).

[3] For example, where the suspect was simply displayed to the witness without the use of a lineup, or where the lineup itself was unfair. See cases cited note 4 *infra*.

[4] See, *e.g.*, People v. Branch, 127 Cal. App. 2d 438, 274 P.2d 31 (Dist. Ct. App. 1954); People v. Crenshaw, 15 Ill. 2d 458, 155 N.E.2d 599, *cert. denied*, 359 U.S. 997 (1959); People v. Mikka, 7 Ill. 2d 454, 131 N.E.2d 79 (1955), *cert. denied*, 350 U.S. 1009 (1956); People v. Lamphear, 6 Ill. 2d 346, 128 N.E.2d 892 (1955). *But see* People v. Sanders, 357 Ill. 610, 192 N.E. 697 (1934); *cf.* People v. Peck, 358 Ill. 642, 193 N.E. 609 (1934); People v. Crane, 302 Ill. 217, 134 N.E. 99 (1922) (sufficiency of identification was so doubtful that, combined with other prejudicial error, it necessitated a new trial for defendant).

as substantive evidence,[5] but only for purposes of demonstrating a witness' credibility.[6] A few cases, however, have dismissed the hearsay objection, sometimes under the rationale expressed in the instant case that the identifying witness' presence in court largely avoids the danger of hearsay by permitting cross-examination about the original identification.[7]

The instant case, involving two separate appeals from convictions based on the same crime but different quanta of evidence as to identity, focuses attention on two complementary controls by which extrajudicial identifications may be handled—standards of admissibility and standards of sufficiency. The intermediate court of appeals simply labeled the policeman's testimony as hearsay and held it inadmissible against one defendant, whose conviction was therefore reversed, but admissible for purposes of corroboration against the other, whose conviction was affirmed.[8] The supreme court arrived at the same disposition of the case, but, significantly, rested its holding on other grounds. Instead of seeking in the equivocal courtroom identification of one of the defendants [9] a crutch to support evidence as to the more persuasive prior identification, the court sensibly ruled that in view of its acknowledged probative value,[10] the policeman's testimony was prop-

[5] See, *e.g.*, People v. Scott, 296 Ill. 268, 129 N.E. 798 (1921); McCandless v. State, 49 Okla. Crim. 116, 295 Pac. 412 (1930); McCormick, Evidence § 39 (1954); Morgan, *The Law of Evidence, 1941-45*, 59 Harv. L. Rev. 481, 545 (1946). A distinction is sometimes drawn between the identifying witness' testimony concerning the prior identification and that of some other observer, the latter being inadmissible. See Comment, 19 Md. L. Rev. 201, 212-20 (1959); Comment, 30 Rocky Mt. L. Rev. 332 (1958).

[6] It has been admitted to corroborate a courtroom identification, see, *e.g.*, United States v. Forzano, 190 F.2d 687 (2d Cir. 1951); Commonwealth v. Locke, 335 Mass. 106, 138 N.E.2d 359 (1956), to rehabilitate an impeached witness, see, *e.g.*, People v. Ferrara, 18 Cal. App. 271, 122 Pac. 1089 (Dist. Ct. App. 1912); Skipper v. Commonwealth, 195 Va. 870, 80 S.E.2d 401 (1954); Thompson v. State, 223 Ind. 39, 58 N.E.2d 112 (1944) (dictum), to rehabilitate a witness who has been shown to have a motive for fabrication which was not present when the prior identification took place, see, *e.g.*, DiCarlo v. United States, 6 F.2d 364 (2d Cir.), *cert. denied*, 268 U.S. 706 (1925); People v. Slobodion, 31 Cal. 2d 555, 191 P.2d 1, *cert. denied*, 335 U.S. 835 (1948); State v. Moon, 20 Idaho 202, 117 Pac. 757 (1911), to impeach a party's own witness whose turnabout testimony has come as a surprise, see, *e.g.*, State v. Connelly, 5 N.J. Misc. 393, 136 Atl. 603 (Sup. Ct. 1927) (dictum); *cf.* People v. Gillespie, 111 Mich. 241, 69 N.W. 490 (1896), or to refresh the recollection of such a witness, State v. Duffy, 134 Ohio St. 16, 15 N.E.2d 535 (1938).

[7] Commonwealth v. Saunders, 386 Pa. 149, 155, 125 A.2d 442, 445 (1956); State v. Wilson, 38 Wash. 2d 593, 617-18, 231 P.2d 288, 300-01, *cert. denied*, 342 U.S. 855 (1951); Blake v. State, 157 Md. 75, 85-86, 145 Atl. 185, 189 (1929) (dissenting opinion); *cf.* Powell v. State, 332 S.W.2d 483 (Ark. 1960) (officer could be asked whether witness made an extrajudicial identification, on the theory the officer was only explaining certain of his actions); People v. Spinello, 303 N.Y. 193, 201-02, 101 N.E.2d 457, 460-61 (1951); N.Y. Code Crim. Pro. § 393-b; Ohio Rev. Code § 2945.55 (1954). Compare Basoff v. State, 208 Md. 643, 650, 119 A.2d 917, 921 (1956) (danger of hearsay avoided because prior identification made under circumstances precluding "unfairness or unreliability"). See generally McCormick, Evidence § 39 (1954); Comment, 19 Md. L. Rev. 201 (1959); Comment, 30 Rocky Mt. L. Rev. 332 (1958); 8 U.C.L.A. L. Rev. 467 (1961).

[8] People v. Gould, 1 Cal. Rptr. 726, 730 (Dist. Ct. App. 1959).

[9] See note 2 *supra*.

[10] See Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177, 192-96 (1948); Comment, 19 Md. L. Rev. 201 (1959); Comment, 30 Rocky Mt. L. Rev. 332 (1958). *But see* State v. Saporen, 205 Minn. 358, 362, 285 N.W. 898, 901 (1939).

erly admitted as substantive evidence. The court justified this relaxation of the hearsay rule by characterizing the evidence as to the extrajudicial identification as more reliable than a courtroom identification, since it was made so soon after the original observation.[11] But the court went on to scrutinize the weight of this evidence and concluded that it was not enough to sustain a verdict. Such attention to the overall sufficiency of the evidence is necessary to counterbalance the risk created by a relaxed standard of admissibility which permits evidence produced by suggestion to come before the jury.[12] Thus, while the California court appears ready to admit some questionable evidence for what it is worth, the court also indicated that such evidence must be worth something, or it will not sustain a conviction.

The language in which the court gives the criteria of "worth" or sufficiency of evidence is ambiguous. First the court seems to lay down a black letter rule of insufficiency as rigid as the rule of inadmissibility from which it earlier freed itself: "An extrajudicial identification that cannot be confirmed by an identification at the trial is insufficient to sustain a conviction in the absence of other evidence tending to connect the defendant with the crime." [13] But the court then points out that the circumstances of the prior identification in the instant case raise suspicions about the quality of the evidence.[14] Thus it is not clear whether the principal element of insufficiency was the witness' failure to repeat the prior identification in court or the dubiousness of the original identification. In view of the court's language extolling the freshness and reliability of early identifications, the mere failure to repeat an identification in court would not seem to be so crucial as necessarily to render the evidence insufficient.[15]

---

[11] Instant case at 626, 354 P.2d at 867, 7 Cal. Rptr. at 275. The court limited the possible impact of its holding by stressing the importance of the identifying witness' presence in court. *Ibid.*

[12] See 1960 ANN. SURVEY AM. L. 556-57. See generally Ladd, *The Relationship of the Principles of Exclusionary Rules of Evidence to the Problem of Proof*, 18 MINN. L. REV. 506 (1934); McCormick, *Tomorrow's Law of Evidence*, 24 A.B.A.J. 507, 581 (1938).

[13] Instant case at 631, 354 P.2d at 870, 7 Cal. Rptr. at 278.

[14] "The small size of the group increased the danger of suggestion. . . . Identification from a still photograph is substantially less reliable than identification of an individual seen in person." *Id.* at 631, 354 P.2d at 870, 7 Cal. Rptr. at 278. There is a further risk that inquiry into the circumstances of a prior identification from photographs will reveal to the jury that defendant has a criminal record. Such photographs are usually "mug" shots with numbers on them, taken from the police files, and may be characterized as such by the prosecutor despite the rule against admission of evidence of arrests or convictions tending to show bad character. See Colbert v. Commonwealth, 306 S.W.2d 825 (Ky. 1957); Commonwealth v. Robinson, 163 Pa. Super. 16, 23, 60 A.2d 824, 827 (1948). *But see* Riley v. State, 74 Okla. Crim. 363, 126 P.2d 284 (1942).

[15] Failure to repeat a prior identification might sometimes indicate that the identification was uncertain and thus unreliable initially despite its proximity to the original observation. See Commonwealth v. Saunders, 386 Pa. 149, 160-66, 125 A.2d 442, 446-50 (1956) (dissenting opinion). However, it could as easily indicate the effect of normal forgetfulness. See instant case at 626, 354 P.2d at 867, 7 Cal. Rptr. at 275. In the absence of concrete evidence of suggestion in the prior identification, these conflicting inferences might best be resolved by the jury. Like a hard-and-fast rule of substantive inadmissibility of prior identification evidence, an inflexible rule

There is no indication in the language of the opinion that a courtroom identification might be so infected by the likelihood of suggestion in an earlier identification as to make the entire evidence as to identity insufficient. Courtroom identifications have been held sufficient even when preceded by extrajudicial identifications far more likely to have been the product of suggestion than the one in the instant case.[16] Perhaps this results from the purely corroborative function for which evidence of extrajudicial identification is usually admitted.[17] In that situation, the court's attention is focused on the courtroom identification—the substantive evidence—while the initial identification, which is likely to be the foundation of the courtroom identification, arouses less concern. But when the same evidence may be admitted for its substantive content, courts may pay closer attention to the circumstances surrounding its elicitation and may tighten control of the quality of that evidence, whether it accompanies a courtroom identification or appears alone.[18] Even though the witness may be available for cross-examination, the scope of the jury's judgment of credibility may frequently be limited by the witness's poor memory: if he cannot remember well enough to make an identification in court, he will probably be an unfruitful subject for cross-examination. Realizing the possible effects of an early identification by a suggestible witness, a court could consistently require a more convincing totality of proof when there has been an extrajudicial identification (either with or without repetition in court) than when there is only a courtroom identification.

WORKMEN'S COMPENSATION — DISABLING PSYCHOSIS CAUSED BY EMOTIONAL PRESSURES OF ASSEMBLY LINE HELD A COMPENSABLE INJURY UNDER STATE WORKMEN'S COMPENSATION ACT.

Claimant, a machine operator, found himself unable to keep up with the assembly line on which he was employed without using a procedure forbidden by the foreman. When he fell behind, the other workers on the line berated him, and when he used the forbidden procedure, he was reprimanded by the foreman. After a while he suffered a mental col-

of insufficiency might have the practical defects of encouraging defendants to seek delays before trial in hope that the witness will forget and of tempting the prosecutor to reinforce the witness' memory, thus introducing an element of false assuredness into his testimony.

[16] See cases cited note 4 *supra*. *But see* Reamer v. United States, 229 F.2d 884 (6th Cir. 1956). The instant case could be read as casting doubt on this state of the law. See 8 U.C.L.A. L. REV. 467, 469-70 (1961).

[17] See cases cited note 6 *supra*. In spite of the theoretical distinction, "corroborative" evidence, it has been suggested, is probably given considerable weight by the jury, who either fail to understand or disregard the judge's instruction distinguishing between substantive and corroborative evidence. See MCCORMICK, EVIDENCE § 39 (1954); 3 WIGMORE, EVIDENCE § 1018(b) (3d ed. 1940).

[18] See Comment, 30 ROCKY MT. L. REV. 332, 338 (1958).

lapse—medically described as paranoid schizophrenia—and was hospitalized for a month. The psychiatric testimony at the hearing on his claim for workmen's compensation showed that while there was nothing unusual about the assembly line job, its pressures triggered a predisposition of claimant's personality toward schizophrenia. The referee awarded compensation and the appeal board, by a divided vote, affirmed, finding that the claimant's injury was caused by his employment, and was therefore compensable under the state workmen's compensation act.[1] The Supreme Court of Michigan affirmed the award, holding that a disabling psychosis caused by the emotional pressures of a job to which the claimant cannot adjust is a compensable injury under the state act. *Carter v. General Motors Corp.*, 361 Mich. 577, 106 N.W.2d 105 (1960).

Workmen's compensation statutes are designed to provide expeditious cash benefits and paid medical care to victims of work-connected injuries without regard to fault on the part of employer or employee.[2] In return for this protection, the employee agrees to forgo any common-law right of action against his employer which may arise from an injury.[3] It is not necessary that the employment be the sole cause of an injury in order for the employee to receive compensation; so long as it in some way contributed to the disability, an award of compensation may be sustained.[4] Thus evidence of a preexisting condition will not automatically disqualify an employee from receiving compensation,[5] if the trier of fact can find some

---

[1] The two members who favored compensation arrived at their decision under different sections of the statute. One voted to grant compensation under part 7 of the Michigan act, MICH. COMP. LAWS § 417.1 (1948), which pertains to occupational diseases, defining personal injury to include "a disease or disability which is due to causes and conditions which are characteristic of and peculiar to the business of the employer and which arises out of and in the course of the employment." Under this part the test of compensation is whether the conditions of employment result in a hazard which distinguishes it in character from other occupations. The other board member voted to award compensation under part 2 of the act, MICH. COMP. LAWS § 412.1 (1948) which provides compensation for a "personal injury arising out of and in the course of . . . employment . . . ." Carter v. General Motors Corp., 361 Mich. 577, 582, 106 N.W.2d 105, 107-08 (1960).

[2] See Crilly v. Ballou, 353 Mich. 303, 308, 91 N.W.2d 493, 496 (1958); Danek v. Hommer, 14 N.J. Super. 607, 611, 82 A.2d 659, 660-61 (Essex County Ct. 1951), *aff'd*, 9 N.J. 56, 87 A.2d 5 (1952). See generally HOROVITZ, WORKMEN'S COMPENSATION 8 (1944).

[3] Danek v. Hommer, *supra* note 2, at 618-19, 82 A.2d at 664-65; Vescio v. Pennsylvania Elec. Co., 336 Pa. 502, 505, 9 A.2d 546, 549 (1939).

[4] The employment is said to be a contributing factor when it combines with, aggravates, or accelerates an existing disease or weakness to produce the disability. Generally, the law will not weigh the relative importance of the two causes. See, *e.g.*, Shivers v. Biloxi-Gulfport Daily Herald, 236 Miss. 303, 308, 110 So. 2d 359, 361 (1959) (preexisting heart disease aggravated by loading fifty pound bundles); Russo v. Wright Aeronautical Corp., 137 N.J.L. 346, 347, 60 A.2d 263, 264 (Sup. Ct. 1948) (aggravation of previous cancerous condition resulting in death); Webb v. New Mexico Publishing Co., 47 N.M. 279, 297-98, 141 P.2d 333, 344-45 (1943) (printer's hands allergic to soap furnished by employer); Harbor Plywood Corp. v. Department of Labor and Indus., 48 Wash. 2d 553, 556-57, 295 P.2d 310, 312 (1956) (injury which accelerated cancerous condition held compensable even though death would have resulted anyway).

[5] In this connection it is often said that the employer takes the employee as he finds him. See, *e.g.*, Cody v. Lewis & West Transit Mix, 186 Kan. 437, 440-41, 351 P.2d 4, 8 (1960); Larson v. Davidson-Boutell Co., 102 N.W.2d 712, 716 (Minn. 1960); Brown v. Industrial Comm'n, 9 Wis. 2d 555, 570, 101 N.W.2d 788, 797 (1960).

causal connection between the disability and the employment.[6] However, inasmuch as the right to compensation is conferred by statute, it is incumbent upon the claimant to establish not only that the employment in fact contributed to the injury sustained, but also that his injury was one of those made compensable by the act. In at least four states, evidence establishing merely that the employment was in fact a cause of the injury satisfies the statutory requirement for compensation.[7] In most of the other states, however, compensation is generally limited either by the terms of the statute or by judicial decision to accidental injuries "arising out of and in the course of the employment." [8] Thus the claimant must show not only that the injury arose out of the employment, but also that it was caused by an "accident." [9] Even in these states, however, the criteria of compensability have varied, mainly because of different judicial interpretations of the phrase "accidental injuries." For example, some states construe the

[6] See Insurance Dep't v. Dinsmore, 233 Miss. 569, 102 So. 2d 691, *suggestion of error dismissed*, 233 Miss. 581, 104 So. 2d 296 (1958), in which the court affirmed an award of compensation where the mental and emotional strain of a job involving clerical and executive duties aggravated the employee's preexisting hypertension and thereby contributed to her stroke. On the issue of causation the court stated that the "medical evidence as a fact must show a causal connection between the obligations of the employment and the final injury. . . . In each case the issue is one of medical causation." *Id.* at 583, 104 So. 2d at 298 (1958). For a discussion of the various criteria of cause-in-fact, see Comment, 70 YALE L.J. 1129, 1140-44 (1961). See generally 37 TEXAS L. REV. 258 (1958). The court in the instant case found that the psychiatric testimony presented by claimant satisfactorily established a nexus between the mental breakdown and the employment. Instant case at 584-85, 106 N.W.2d at 108.

[7] California, Iowa, Massachusetts, and Rhode Island have never had a "by accident" requirement in their compensation statutes. See CAL. LAB. CODE § 3208; IOWA CODE ANN. § 85.61-.69 (1949); MASS. GEN. LAWS ANN. ch. 152, § 1 (1957); R.I. GEN. LAWS ANN. §§ 28-33-1 (1956). See generally 1 LARSON, WORKMEN'S COMPENSATION LAW § 38.83 (1952). Compare notes 8-9 *infra*. Minnesota amended its statute in 1953, substituting "personal injury" for "accidental injury." MINN. STAT. ANN. § 176.011 (Supp. 1960). This change was first interpreted in Gillette v. Harold, Inc., 101 N.W.2d 200 (Minn. 1960), in which a saleswoman, required by her job to be on her feet most of the time, suffered a 35% disability when her continual standing aggravated a preexisting deteriorative disorder of the joint of her left great toe; the court held that the change in the statute abolished the need for showing that the injury resulted from an "accident." Michigan has made a similar change in its statute, but its significance is far from clear, though the opinion in the instant case seems to suggest that a discernible series of specific events must still be identified as having caused the injury in order for an award of compensation to be sustained. See instant case at 593, 106 N.W.2d at 113.

[8] See, *e.g.*, MICH. COMP. LAWS § 412.1 (1948), Hagopian v. Highland Park, 313 Mich. 608, 22 N.W.2d 116 (1946); MISS. CODE ANN. § 6998-02 (Supp. 1960); N.J. REV. STAT. § 34:15-1 (Supp. 1959); N.Y. WORKMEN'S COMP. LAW § 2. "Arising out of" has been interpreted as meaning that the injury must be caused by the job. "Course of employment," on the other hand, has been construed as requiring that the injury must occur at a time and place and in the performance of work reasonably related to the employment. See LARSON, *op. cit. supra* note 7, §§ 6.10, 14.00. *But see* N.D. REV. CODE § 65-01-02 (1960); PA. STAT. ANN. tit. 77, § 411 (1952); TEX. REV. STAT. ANN. art. 8306 (1956); WIS. STAT. § 102.03 (1957); WYO. STAT. ANN. § 27-50 (1957).

[9] This requirement was drawn from the English act, Workmen's Compensation Act, 1897, 60 & 61 Vict., c. 37, § 1, which served as a pattern for many of the American statutes. By the time it had been adopted in this country, however, the English courts had given it a broader construction than has generally been accepted in this country. See Fenton v. J. Thorley & Co., [1903] A.C. 443. See generally 1 Larson, *op. cit. supra* note 7, § 38.10, at 517.

phrase as requiring that the injury be caused by a single fortuitous mishap,[10] while others will permit compensation where a series of such events culminated in disability;[11] some find the statutory requirement satisfied when the injury occurs in the course of the claimant's usual activity,[12] while others require that it result from some unusual undertaking on his part.[13] Similarly, a number of states interpret the phrase as contemplating only those injuries caused by an unexpected event,[14] while others also include those which are an unexpected result of a routine activity.[15] Statutory

[10] See, *e.g.*, Thuillez v. Yellow Transit Freight Lines, Inc., 187 Kan. 516, 358 P.2d 676 (1961); Eastern Shore Pub. Serv. Co. v. Young, 218 Md. 338, 146 A.2d 884 (1958); Davis v. Goodyear Tire & Rubber Co., 168 Ohio St. 482, 155 N.E.2d 889 (1959).

[11] There appears to be a growing tendency on the part of courts to interpret the phrase in this fashion. In many cases the courts have even strained the imagination in identifying certain events as causative. See, *e.g.*, Beveridge v. Industrial Acc. Comm'n, 175 Cal. App. 2d 592, 346 P.2d 545 (Dist. Ct. App. 1959) (back injury resulting from series of slight injuries); Mottonen v. Calumet & Hecla, Inc., 360 Mich. 659, 105 N.W.2d 33 (1960) (strenuous physical labor in weeks preceding a heart attack); Insurance Dep't v. Dinsmore, 233 Miss. 569, 102 So. 2d 691, *suggestion of error dismissed*, 233 Miss. 581, 104 So. 2d 296 (1958) (stress of clerical and executive job on hypertensive employee over a period of years contributed to her stroke); Joy v. Florence Pipe Foundry Co., 64 N.J. Super. 13, 165 A.2d 191 (Super. Ct. 1960), *petition for certification denied*, 34 N.J. 67, 167 A.2d 55 (1961) (strain and tension over a period of several months while supervising installation of machinery caused heart attack).

[12] See Great Atl. & Pac. Tea Co. v. Cardillo, 127 F.2d 334 (D.C. Cir. 1942) (aggravation of arthritic condition caused by lifting five-gallon can); Garafola v. Yale & Towne Mfg. Co., 131 Conn. 572, 41 A.2d 451 (1945) (back sprain from usual exertion); Wisconsin Appelton Co. v. Indus. Comm'n, 269 Wisc. 312, 322, 69 N.W.2d 433, 439 (1955) (herniated disc after usual lifting).

[13] Huff v. Aetna Ins. Co., 360 P.2d 667 (Colo. 1961) (denying compensation for death resulting from a heart attack suffered after changing a tire on ground that it was part of deceased's usual job); Plastic Assembled Products, Inc. v. Benkoe, 224 Md. 256, 167 A.2d 589 (1961) (awarding compensation to claimant who collapsed in 110 degree heat caused in part by 400 Bunsen burners in the room); Sims v. South Carolina State Comm'n of Forestry, 235 S.C. 1, 109 S.E.2d 701 (1959) (denying compensation for heart attack suffered while climbing fire tower on the ground that it was part of the claimant's usual job).

[14] "Accidental cause" is the generally accepted shorthand term for this type of accident. It encompasses the usual industrial accidents—explosions, collisions, slips, and the like. See Sutton v. Brown's Tie & Lumber Co., 350 P.2d 345, 346 (Idaho 1960) (employee lifting fifteen pound boards suffered heart attack; award of compensation reversed and remanded for the finding of whether this was an accident); Eastern Shore Pub. Serv. Co. v. Young, 218 Md. 338, 342-43, 146 A.2d 884, 886 (1958) (employee lifted heavy buckarm in about same manner as he normally did; held, resultant back injury was not an accidental injury); Davis v. Goodyear Tire & Rubber Co., 168 Ohio St. 482, 483-84, 155 N.E.2d 889, 890 (1959) (employee building tires suffered a back injury when he pushed on a tire that had stuck; held, injury not accidental).

[15] "Accidental result" is the term courts and commentators use to characterize an injury which occurs while the claimant is performing his usual job in the normal manner. Such an injury is compensable upon a satisfactory showing of causation, despite the absence of any unusual external force. See, *e.g.*, Wesco Elec. Co. v. Shook, 353 P.2d 743 (Colo. 1960) (electrician who suffered a herniation of an intervertebral disc from working in an unnatural and cramped position awarded compensation); Olson v. State Indus. Acc. Comm'n, 352 P.2d 1096 (Ore. 1960) (compensation awarded claimant who suffered a heart attack while climbing on a truck bed); Sosna v. Ford Motor Co., 192 Pa. Super. 456, 161 A.2d 657 (1960) (claimant who sprained back pushing automobile back onto turntable awarded compensation). Two recent decisions cited by the court in the instant case apparently establish Michigan as accepting the accidental result theory: Coombe v. Penegor, 348 Mich. 635, 83 N.W.2d 603 (1957); Sheppard v. Michigan Nat'l Bank, 348 Mich. 577, 83

schemes which require such nicety in identifying the cause of an injury make compensation for mental injuries especially difficult; for psychiatric testimony, upon which recovery in these cases usually depends, can seldom achieve the precision necessary to isolate the specific events—if indeed there were any—which caused the mental collapse. Thus only when mental injuries have accompanied physical injuries [16] or have resulted from a sudden traumatic experience [17] have courts had any tendency to compensate. The instant case is unusual, therefore, in that it allows compensation for a mental injury caused in neither of these two ways.

As the court recognized,[18] the present case raised problems which the long line of Michigan cases [19] involving mental injuries resulting from sudden traumatic shocks or accompanying physical injuries did not pose. In the case of a mental injury caused by a sudden trauma, medical testimony merely establishes the extent and possible causes of the disability. Lay testimony is then required to identify which of the possible causes in fact occurred in the course of claimant's employment. In the instant case, however, the psychiatric witness specifically identified what, in his opinion, actually caused the disability. The importance of lay evidence was thereby undermined, for claimant's coworkers were probably oblivious to the effect

---

N.W.2d 614 (1957). Some jurisdictions have extended the accidental result theory to its apparent ultimate by holding that an accident arises out of the employment when the degree of exertion required to perform the job is too much for the particular worker involved. See Safeway Stores Inc. v. Harrison, 320 S.W.2d 131 (Ark. 1959); Fulton County v. Windsor, 100 Ga. App. 237, 110 S.E.2d 594 (1959); Wilson v. Sante Fe Trail Transp. Co., 185 Kan. 725, 347 P.2d 235 (1959); Richter v. Shoppe Plumbing & Heating Co., 100 N.W.2d 96 (Minn. 1959).

[16] See, *e.g.*, American Smelting & Ref. Co. v. Industrial Comm'n, 59 Ariz. 87, 123 P.2d 163 (1942); Watson v. Melman, Inc., 106 So. 2d 433 (Fla. 1958); Pohl v. American Bridge Div. U.S. Steel Corp., 109 So. 2d 823 (La. 1959). See generally 1 LARSON, *op. cit. supra* note 7, § 42.22 (1952). Courts generally will also compensate where an emotional stimulus results in a purely physical injury. See McClain v. Board of Educ., 30 N.J. 567, 154 A.2d 569 (1959); Church v. Westchester County, 253 App. Div. 859, 1 N.Y.S.2d 581 (1938); Hunter v. St. Mary's Natural Gas Co., 122 Pa. Super. 300, 186 Atl. 325 (1936).

[17] See Charon's Case, 321 Mass. 694, 75 N.E.2d 511 (1947); Bailey v. American Gen. Ins. Co., 154 Tex. 430, 279 S.W.2d 315 (1955); Burlington Mills Corp. v. Hagood, 177 Va. 204, 13 S.E.2d 291 (1941). *Contra*, Bekelski v. O. F. Neal Co., 141 Neb. 657, 4 N.W.2d 741 (1942); Voss v. Prudential Ins. Co. of America, 14 N.J. Misc. 791, 187 Atl. 334 (Workmen's Comp. Bureau 1936); Liscio v. S. Makransky & Sons, 147 Pa. Super. 483, 24 A.2d 136 (1942). In Webber v. Wofford-Brindley Lumber Co., 113 So. 2d 23 (La. 1959), the court extended compensation to a disability even though its causation was imaginary and the result of a traumatic neurosis. The court said that the test for recovery in such cases was "whether the employee is sincere in his belief that he suffers a disabling resultant of a real injury . . . ." *Id.* at 25. Some statutes, however, specifically require that the injury be physical. See, *e.g.*, NEB. REV. STAT. § 48-151 (1952). Compare WIS. STAT. § 102.01 (Supp. 1961) ("'injury' is mental or physical harm to an employee caused by accident").

[18] See instant case at 585, 106 N.W.2d at 109.

[19] See Redfern v. Sparks-Withington Co., 353 Mich. 286, 91 N.W.2d 516 (1958) ("conversion hysteria" traceable to injury received when struck by steel weight); Hayes v. Detroit Steel Casting Co., 328 Mich. 609, 44 N.W.2d 190 (1950) (neurosis resulting from injury which necessitated removal of an eye); Karwacki v. General Motors Corp., 293 Mich. 355, 292 N.W. 328 (1940) (latent mental disturbance aggravated by work-incurred infection); Klein v. Len H. Darling Co., 217 Mich. 485, 187 N.W. 400 (1922) (death from shock which resulted from dropping a register on a coworker's head).

which assembly line pressures had on claimant's mental equilibrium.[20] In such a case, the psychiatrist's role obviously is enhanced, and the possibilities for abuse of his influence are increased. Therefore, it is significant that the court carefully separated the questions of causation and compensability,[21] thus preserving to itself the peculiarly legal issue of whether the claimant's injury was compensable under the act. In so doing, the court avoided giving the psychiatrist's testimony such conclusive weight as a criterion based solely on cause-in-fact would have produced in the instant case.[22] Instead, the court, by pinpointing certain events—"the pressure of [the] job and the pressure of [the] foreman" [23]—as causative factors, succeeded in imposing some semblance of a "by accident" requirement. As a result, the likelihood of compensation awards becoming completely dependent upon the word of medical "advocates" [24]—physicians who uncannily find a connection between a claimant's disability and his employment—is avoided, and the prospect of workmen's compensation becoming (in effect) a program of blanket insurance for employees, which it was not intended to be,[25] is negated. The present case, while admittedly expanding the judicially defined range of workmen's compensation,[26] nevertheless retains as an essential feature of compensation proceedings some determination by a judicial or quasi-judicial body that a claimant's injury was one which the statute was intended to cover, thereby avoiding an abdication of this function to medical experts.

---

[20] *Compare* the account of the physician's testimony in Klein v. Len H. Darling Co., 217 Mich. 485, 187 N.W. 400 (1922), *with* the psychiatrist's testimony in the instant case at 583-84, 106 N.W.2d at 108-09.

[21] Instant case at 583, 106 N.W.2d at 108.

[22] See note 7 *supra*.

[23] Instant case at 593, 106 N.W.2d at 113.

[24] See Holschuh, *Advocacy in the Preparation and Presentation of Medical Evidence*, 21 OHIO ST. L.J. 160-61 (1960); Peck, *Impartial Medical Testimony*, 22 F.R.D. 21, 22 (1958). Courts have also noted this problem. See Kemeny v. Skorch, 22 Ill. App. 2d 160, 170, 159 N.E.2d 489, 493 (1959); Murphy v. Pennsylvania R.R., 292 Pa. 213, 216, 140 Atl. 867, 869 (1927).

[25] See, *e.g.*, Fidelity & Cas. Co. v. Scott, 215 Ga. 491, 496, 111 S.E.2d 223, 226 (1959); Sutton v. Brown's Tie & Lumber Co., 350 P.2d 345, 348 (Idaho 1960); Riley v. Kohlenberg, 316 Mich. 144, 148-49, 25 N.W.2d 144, 146 (1946).

[26] A useful discussion of the effect of awarding compensation in cases of mental injury is in Comment, 70 YALE L.J. 1129, 1145-50 (1961).